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**El Rio Bakery, Inc. and Maria Teresa Tolano and Workers' Rights Clinic, James E. Rogers College of Law, University of Arizona.** Cases 28–CA–216755 and 28–CA–221086

February 28, 2019

**DECISION AND ORDER**

BY CHAIRMAN RING AND MEMBERS KAPLAN  
AND EMANUEL

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and an amended charge filed by Maria Teresa Tolano in Case 28–CA–216755 on March 16 and 19, 2018, respectively, and upon a charge, amended charge, and second amended charge filed by Workers Rights Clinic, James E. Rogers College of Law, University of Arizona in Case 28–CA–221086 on May 29, June 13, and July 2, 2018, respectively, the General Counsel issued an Order Consolidating Cases and Consolidated Complaint on July 25, 2018 against El Rio Bakery, Inc. (the Respondent), alleging that it has violated Section 8(a)(4) and (1) of the Act. Although properly served copies of the charges and the consolidated complaint, the Respondent failed to file an answer.

On August 24, 2018, the General Counsel filed a Motion to Transfer and Continue Matter before the Board and Default Judgment.<sup>1</sup> On August 29, 2018, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Default Judgment**

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the consolidated complaint affirmatively states that an answer must be received on or before August 8, 2018, and that if no answer is filed, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the consolidated complaint are true. Further, the undisputed allegations in the General Counsel's

motion disclose that the Region, by letter dated August 9, 2018, notified the Respondent that unless an answer was received by August 16, 2018, a motion for default judgment would be filed. No answer or request for an extension of time to file an answer was received by that date.

In the absence of good cause for the lack of a timely answer, we deem the allegations in the consolidated complaint to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent has been a corporation with a facility located in Tucson, Arizona, and has been engaged in the retail and nonretail sale of baked goods. The nonretail business operations of the Respondent are more than de minimis.

During the 12-month period ending March 16, 2018, the Respondent, in conducting its business operations described above, purchased and received goods valued in excess of \$50,000 at its Tucson, Arizona facility directly from points outside the State of Arizona and from other enterprises, including Mendez Tortilla, located within the State of Arizona, each of which had received the goods directly from points outside the State of Arizona.

During the same 12-month period, the Respondent purchased and received at its Tucson, Arizona facility goods valued in excess of \$5000 directly from points outside the State of Arizona and from other enterprises, including Mendez Tortilla, located within the State of Arizona, each of which had received the goods directly from points outside the State of Arizona.

During the same 12-month period, the Respondent, in conducting its operations described above, derived gross revenues in excess of \$500,000.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Carlos Guillermo Vargas Mendoza - Owner  
Griselda Vargas – Owner

<sup>1</sup> On October 17, 2018, the General Counsel filed a correction to his motion. The correction does not affect our disposition of the case.

The following events occurred, giving rise to these proceedings.

1(a) Between May 2017 and September 2017, the Respondent's employee Raquel Herrera Lopez (Lopez) engaged in concerted activities with other employees for the purpose of mutual aid and protection and concertedly complained to the Respondent regarding the wages, hours, and working conditions of the Respondent's employees by raising concerns to other employees, and to the Respondent on behalf of herself and other employees, about employees not being paid minimum wage.

(b) Between September 2017 and February 2018, the Respondent's employee Maria Teresa Tolano (Tolano) engaged in concerted activities with other employees for the purpose of mutual aid and protection and concertedly complained to the Respondent regarding the wages, hours, and working conditions of the Respondent's employees by raising concerns to other employees, and to the Respondent on behalf of herself and other employees, about employees not being paid minimum wage.

(c) Between September 2017 and May 2018, the Respondent's employees Javier Ponce (Ponce) and Jose Daniel Mendoza (Mendoza) engaged in concerted activities with other employees for the purposes of mutual aid and protection and concertedly complained to the Respondent regarding the wages, hours, and working conditions of the Respondent's employees by raising concerns to other employees, and to the Respondent on behalf of themselves and other employees, about employees not being paid minimum wage.

(d) On about September 22, 2017, the Respondent, by Carlos Guillermo Vargas Mendoza, at the Respondent's facility, by referring to employees' protected concerted activities without disclosing how it knew of those activities, created an impression among its employees that their protected concerted activities were under surveillance by the Respondent.

(e) On about September 24, 2018, the Respondent discharged its employee Lopez.<sup>2</sup>

(f) On about February 18, 2018, the Respondent discharged its employee Tolano.

(g) On about February 20, 2018, the Respondent required its employee Ponce to complete a new job application.

(h) On about February 21, 2018, the Respondent required its employee Mendoza to complete a new job application.

(i) On about May 2018, the Respondent assigned employees Javier Ponce and Jose Daniel Mendoza reduced

hours of work and thereby caused the discharge of Ponce on about May 2018 and of Mendoza on about June 2018.

2(a) The Respondent engaged in the conduct described above in paragraphs 1(e) through (i) because its employees Lopez, Tolano, Ponce, and Mendoza engaged in the conduct described above in paragraphs 1(a) through (c), respectively, and to discourage employees from engaging in these or other concerted activities.

(b) The Respondent engaged in the conduct described above in paragraphs 1(i) because Ponce and Mendoza cooperated in a Board investigation in Case 28-CA-216755.

#### CONCLUSIONS OF LAW

By the conduct described above in paragraph 2(a), the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

By the conduct described above in paragraph 2(b), the Respondent has been discriminating against employees for filing charges or giving testimony under the Act in violation of Section 8(a)(4) and (1) of the Act.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) by discharging employees Lopez, Tolano, Ponce, and Mendoza for engaging in protected concerted activity, and violated Section 8(a)(4) and (1) by discharging and/or constructively discharging employees Ponce and Mendoza for engaging in protected concerted activities and for cooperating in a Board investigation, we shall order the Respondent to reinstate these employees and make them whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate the employees for their search-for-work and

<sup>2</sup> The complaint states that the Respondent discharged "its employee Herrera" on September 24. Because the complaint does not otherwise

refer to an employee Herrera, we find that this allegation refers to employee Raquel Herrera Lopez.

interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.<sup>3</sup>

Having found that the Respondent unlawfully reduced the hours worked by Ponce and Mendoza, we shall order the Respondent to make them whole for any losses suffered as a result of the reduction in their hours in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In addition, we shall order the Respondent to compensate the named employees for any adverse tax consequences of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 28 allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

The Respondent shall also be required to remove from its files any reference to the unlawful discharges of Lopez, Tolano, Ponce, and Mendoza and to notify them in writing that this has been done and that the unlawful discharges will not be used against them in any way.

#### ORDER

The National Labor Relations Board orders that the Respondent, El Rio Bakery, Inc., Tucson, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression that it is engaged in surveillance of its employees' protected concerted activities.

(b) Reducing its employees' work hours, discharging, or constructively discharging its employees because they engage in protected concerted activities.

(c) Reducing its employees' work hours, discharging and/or constructively discharging, or otherwise discriminating against its employees because they cooperate in a Board investigation.

(d) Requiring that employees complete new job applications because they engage in protected concerted activity.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

<sup>3</sup> The General Counsel additionally seeks a make-whole remedy that includes reasonable consequential damages incurred as a result of the Respondent's unfair labor practices. This issue, which was not briefed, would involve a change in Board law. We are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Maria Teresa Tolano, Raquel Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Maria Teresa Tolano, Raquel Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this Decision and Order.

(c) Make Javier Ponce and Jose Daniel Mendoza whole for any loss of earnings and other benefits suffered as a result of the unlawful reduction of their work hours in the manner set forth in the remedy section of this Decision and Order.

(d) Compensate Maria Teresa Tolano, Raquel Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and/or constructive discharges, and within 3 days thereafter notify Maria Teresa Tolano, Raquel Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza in writing that this has been done and that their discharges and/or constructive discharges will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Tucson, Arizona, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after

to order this relief at this time. See, e.g., *Laborers' International Union of North America, Local Union No. 91 (Council of Utility Contractors, Inc.)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National

being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 22, 2017.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 28, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

\_\_\_\_\_  
Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT create the impression that we are engaged in surveillance of your protected concerted activities.

WE WILL NOT reduce the work hours, discharge, or constructively discharge any employee for engaging in protected concerted activities.

WE WILL NOT reduce the work hours, discharge, or constructively discharge, or otherwise discriminate against any of you for cooperating in a National Labor Relations Board investigation or for filing a charge with the National Labor Relations Board.

WE WILL NOT require you to complete a new job application because you engage in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Maria Teresa Tolano, Raquel Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Maria Teresa Tolano, Raquel Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest, and WE WILL also make those employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL make Javier Ponce and Jose Daniel Mendoza whole for any loss of earnings and other benefits suffered as a result of our unlawful reduction in their hours of work, plus interest.

WE WILL compensate Maria Teresa Tolano, Raquel Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or

Board order, a report allocating the backpay awards to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and/or constructive discharges of Maria Teresa Tolano, Raquel Herrera Lopez, Javier Ponce, and Jose Daniel Mendoza, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and/or constructive discharges will not be used against them in any way.

EL RIO BAKERY, INC.

The Board's decision can be found at [www.nlrb.gov/case/28-CA-216755](http://www.nlrb.gov/case/28-CA-216755) or by using the QR

code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

